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Buffalo Hunt Enjoined - Mr. Kohns/MAJ Ayres

On 26 Jan 96, the United States District Court for the District of New Mexico enjoined a buffalo hunt that was to commence the following weekend at Fort Wingate, New Mexico. Funds for Animals, et al., v. United States, NO. 6:96-CV-40 MV/DJS (D.N.M. 1996). Animal rights activists and local Indian tribes challenged the Army's concurrence in a hunt sponsored by the New Mexico Game and Fish Department (NMGFD) of state-owned buffalo. The buffalo had been introduced to Fort Wingate in 1965. Plaintiffs argued, and the court agreed, that the Army did not perform adequate National Environmental Policy Act (NEPA) analysis prior to approving access to the installation for the hunt.

Facts

The NMGFD sought to sponsor the hunt as a means of controlling buffalo over-population and to mitigate destruction of the buffalo range. The NMGFD promulgated the hunt as a state regulation.[1] The NMGFD decided that the hunt was necessary based on its analysis of the buffalo population, decided the number of buffalo to be killed, age of bulls to be shot, determined how the hunters were to be chosen, selected the hunters, established the time-table for the hunts, and agreed to supply NMGFD employees to escort the hunters.

New Mexico notified the local Army commander of the hunt and requested access. The commander granted access subject to four conditions: (1) the hunters were to be accompanied by a NMGFD employee; (2) hunters would hold the U.S. harmless for any harm suffered by the hunter on the hunt; (3) hunters would observe Army-specified off-limits areas designated to protect federal interests; and (4) hunters were prohibited from bringing flame producing devices or alcohol onto Fort Wingate. Additionally, no federal funds were to be used to perform the hunt; federal funds could be expended solely to provide access to Fort Wingate.

Issue

No NEPA analysis was performed on the grant of access for the hunt, or for the pre-NEPA agreement between the Army and New Mexico in 1965 that introduced the buffalo to Fort

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[1] By statute, the Army must comply with state hunting, fishing, and trapping regulations. 10 U.S.C. §2671. The statute further requires the Army to provide state officials full access to its installation to carry out these regulations, conditioned only by safety and military security measures.

Wingate.[2] Plaintiffs argued that this failure to perform NEPA analysis was illegal because the Army's decision to grant access was a "major federal action" due to its impact upon the plaintiffs' interests in the buffalo and ancient Indian ruins located on Fort Wingate. The Army countered that the proposed hunt was not a "federal action" because the Army had no discretion to control the hunt in any environmentally meaningful way.

Court's Conclusion

The court held for the plaintiffs, finding that the Army's ability to place conditions on the hunt constituted enough control to trigger NEPA. The court ordered the Army to take no action in furtherance of the hunt until the necessary NEPA analysis has been performed. The Army has asked the court to reconsider its decision, as such hunts were contemplated in the 1965 agreement predating NEPA and such pre-NEPA activities do not require NEPA analysis. If the court does not overrule its earlier decision, the Army is considering an Appeal.

Applicability Army-Wide

The Army contends that no NEPA analysis is necessary where the Army lacks discretion to act. This is true particularly where the State promulgates a hunting or fishing regulation that we are required by law to follow. As a practical measure, however, Army installations should include the guidelines for hunting and fishing programs in their installation's Integrated Natural Resources Management Plan (INRMP). All installation INRMPs must undergo NEPA analysis in accordance with DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988). Until the case above can be resolved, proposed modifications to the hunting or fishing programs can be analyzed to satisfy NEPA requirements by "tiering off" the basic INRMP NEPA document. Analyzing the effects of modifications to the hunting and fishing programs in this manner would protect the installation from challenge by animal rights groups or other interested parties.

Army Decision Making And The National Environmental Policy Act - MAJ Mayfield

Recently, some environmental offices appear to be uncertain about the application of the National Environmental Policy Act (NEPA) to Army decision making, and about the proper use of Categorical Exclusions. ELSs must take an active role in ensuring that the requirements of NEPA are not overlooked or injudiciously dismissed.

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[2] NEPA requires an evaluation of the environmental impacts of "major federal actions." The first step in deciding whether to perform such an analysis requires determining whether the proposed action is "federal." Mere federal involvement is not enough. This determination hinges on the amount of control and responsibility the Federal government has over the action itself. An often-quoted passage from William Rodgers' treatise on environmental law articulates the nature of the "action" necessary to trigger NEPA analysis:

> [T]he distinguishing feature of "federal" involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decisionmaker [sic]. This presupposes he had judgment to exercise. Cases finding "federal" action emphasize authority to exercise discretion over the outcome.

As a general rule, all Army actions that have the potential to impact the human environment are subject to NEPA. Decisions involving routine actions often require little or no formal review, while decisions on new actions can trigger substantial review procedures. In rare cases, the Army's involvement in an action is so minor that it does not constitute a "federal action" and NEPA should not apply. See, Funds for Animals, et al., v. United States, NO. 6:96-CV-40 MV/DJS (D.N.M. 1996), discussed above.

Army regulations provide a good framework for implementing NEPA's requirements in Army decision making. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, (23 Dec. 1988) [hereinafter AR 200-2]. Environmental offices should follow AR 200-2's NEPA flow chart at Figure 2-1. This chart does not contain a "NO-REVIEW" option and should encourage environmental offices to engage in a meaningful NEPA review of proposed Army actions.

NEPA review for Army decisions frequently is satisfied by a Categorical Exclusion (CX). AR 200-2, Appendix A, lists 29 CXs that cover routine Army activities that the Army has determined do not create significant environmental impacts. If a proposed action is encompassed by an existing CX, and no extraordinary circumstances exist to indicate that the proposed action may have significant environmental impacts, then no further NEPA analysis is required. To determine if extraordinary circumstances exist, environmental offices must review the proposed action in light of the screening criteria listed at Appendix A. Unfortunately, environmental offices often view a proposed action that is covered by a CX as an action that requires no NEPA analysis, or they fail to properly document, when required, the rationale for the application of the CX.

Many CXs require that a Record of Environmental Consideration (REC) be produced to explain the reason that no further NEPA analysis and documentation are required. RECs must thoroughly address each element of the screening criteria to confirm that no extraordinary circumstances exist. This is especially true with proposed actions that are likely to cause public controversy. If the Army's decision is later judicially reviewed, then the REC will be the administrative record that must justify the application of the CX. See, Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986); and Greenpeace U.S.A. v. Evans, 688 F.Supp. 579 (W.D.Wash. 1987). RECs must be completed prior to a making a decision.

ELSs must be actively involved in the planning process for Army actions to ensure that NEPA review is conducted and that the necessary documentation is prepared before a decision is made. A determination that NEPA does not apply to a proposed action should be coordinated with the MACOM ELS, as should use of Categorical Exclusions relating to controversial projects.

Asbestos Management Program - LTC Olmscheid

Unions are aggressively seeking Environmental Differential Pay (EDP) because of worker exposure to asbestos. The Army has paid several multimillion dollar EDP awards to employees for asbestos exposure in recent years. Army failure to comply with the requirements of the asbestos management program, as specified in DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 10-1 to 10-5 (23 Apr. 1990), can be a major factor in arbitrator decisions to award EDP, even when asbestos exposure is undocumented or below OSHA standards.

Environmental assessments of Army installations during the last several years indicate that some installations did not complete asbestos surveys, or did not have complete asbestos management programs in place to deal with asbestos problems revealed by asbestos surveys.

Where asbestos surveys were not done, unions have sometimes been successful in convincing labor arbitrators that installations have the burden of proof to show that employees were not exposed. Since surveys were not done, the government has been unable to meet its burden of proof. In other instances, unions have been able to show that the government did not take steps to correct problems uncovered by the surveys.

Installation ELSs should take an active role to ensure that their installation has an effective asbestos management program. Asbestos exposure is an excellent example of an environmental problem that has a direct labor consequence. The Army intends to publish, in the near future, an installation manual that gives technical guidance regarding the management of asbestos on Army installations. ELSs should become familiar with this document once it becomes available.

National Defense Authorization Act of 1996 Passed - Ms. Fedel

President Clinton signed into law the 1996 National Defense Authorization Act on 10 Feb 96. National Defense Authorization Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996). The Act contains several amendments that affect the Installation Restoration Program. Among the new provisions, CERCLA section 120(h)(3) [42 U.S.C. § 9620(h)(3)] has been amended to allow the United States to lease BRAC property without requiring that all remedial action necessary
has been taken before the date of transfer. The amendment allows the United States to lease the property even where the lessee has agreed to purchase the property, or where the lease is in excess of 55 years. The United States is required to "determine," in consultation with the USEPA, that there are "adequate assurances" that the United States will take all remedial action necessary that has not been taken on the date of the lease.

The Act amends also several provisions relating to the Defense Environmental Restoration Account (DERA). Section 323 of the Act instructs the Secretary of Defense to set a goal in place by FY97 to limit spending for administration, support, studies, and investigations associated with DERA to twenty per cent of the total funding for the account. In addition, this section provides that the Secretary of Defense shall prescribe regulations regarding the establishment, characteristics, composition, and funding of Restoration Advisory Boards (RABs).